87-2080

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1987

JACK R. DUCKWORTH and
INDIANA ATTORNEY GENERAL,

Petitioners,

vs.

ARNOLD MAURICIO, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a criminal Defendant has a constitutional right to present a fabricated alibi without risk of being caught.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Jack R. Duckworth and Linley E. Pearson, Indiana Attorney General, respectfully pray the Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereafter the "Seventh Circuit") entered in Cause Number 86-1842 on February 10, 1988, petition for rehearing having been denied on April 12, 1988. The Seventh Circuit decision reversed and remanded this cause to the United States District Court for the Northern District of Indiana, South Bend Division (hereafter the "District Court").

OPINIONS BELOW

The decision of the Seventh Circuit denying Petitioners' request for Rehearing in Banc issued on April 12, 1988. A copy

of that Order has been included in the appendix at page A-1. The decision of the Seventh Circuit reversing and remanding this Cause to the District Court issued on February 10, 1988. A copy of the Circuit Court's opinion is included in the appendix at page A-2. The decision of the District Court was entered on May 2, 1986. A copy of the memorandum and order of the District Court is included in the appendix at page A-16.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 and Rule 17 of this Court. The decision of the Seventh Circuit was entered on February 10, 1988. This decision was reviewed on April 12, 1988, when the Seventh Circuit denied Petitioner's petition for rehearing in banc. This petition is timely filed in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c) and Rule 20.2 as measured from the issuance of the denial of Petitioners' petition for rehearing pursuant to Rule 20.4, Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment to the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2241(c) provides in pertinent part:

> (c) The writ of habeas corpus shall not extend to a prisoner unless —

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or . . . .

STATEMENT OF THE CASE

A. Nature of the Case

The Respondent Arnold Mauricio, Jr. (hereafter "Mauricio") is currently incarcerated at the Indiana State Prison, Michigan City, Indiana and has been so incarcerated at all times while this matter was before the Courts.

Respondent filed a petition for writ of habeas corpus in District Court. The only issue raised in Respondent's petition was whether his trial was rendered constitutionally infirm by the state court allowing a rebuttal witness to testify for the state where the state had failed to provide Respondent with the name of that witness prior to trial.

B. Course of Proceedings

Respondent was convicted of aiding felony-murder and robbery in the Allen Circuit Court. This conviction was upheld by the Supreme Court of Indiana. On September 19, 1985, Respondent filed his petition for writ of habeas corpus with the District Court. Petitioners filed their Return to said petition on November 5, 1985. The petition was denied by order of the District Court on May 2, 1986.

Respondent's notice of appeal was timely filed and the District Court issued a Certificate of Probable Cause on May 22, 1986. Respondent filed an Appellant's brief *pro se* with the assistance of a lay advocate on or about July 15, 1986. Petitioners filed their Appellees' brief on August 18, 1986.

The Circuit Court *sua sponte* appointed counsel for Respondent on February 11, 1987. Court-appointed Counsel for Respondent filed a Supplemental Appellant's brief on or about April 6, 1987. Petitioners filed their Supplemental Appellees' brief on or about May 6, 1987. A supplemental Reply Brief was filed by Respondents Court Appointed Counsel on or about June 3, 1987.

The Circuit Court heard Arguments on this cause on November 17, 1987. A decision reversing the District Court and remanding this cause was entered by the Circuit Court on February 10, 1988. Petitioners filed their petition for Rehearing in Banc which was denied by the Circuit Court on April 12, 1988. This Petition for Writ of Certiorari results.

REASONS FOR ALLOWANCE OF THE WRIT

The Seventh Circuit wrongfully determined that a criminal defendant may present a fabricated alibi without fear of being exposed by an undisclosed rebuttal witness.

This case presents a question of conflict and balance. The conflict arises out of the principle the state is required to engage in reciprocal discovery in prosecutions, which collides in this cause with an equally valid precedent which exempts the parties from disclosing rebuttal witnesses. Some balance must be struck in requiring the state to disclose witnesses through reciprocal discovery while providing for those exigencies which arise requiring the testimony of rebuttal witnesses which might not be fully contemplated prior to trial.

It is clear that the Indiana alibi statutes, (IC 35-5-1-1, 2 and 3) equally balance the burdens and requirements between the defendant and the prosecution. *Bruce v. Duckworth*, 659 F.2d 776 (7th Cir. 1981), citing *Wardin vs. Oregon*, 412 U.S. 470, (1973). However, it is equally clear that the subject statutes do not place a responsibility on either party to specify the names of witnesses who will testify in support or in contradiction of the alibi. (For such statutes requiring as much, see the Florida statute as reviewed in *Williams v. Florida*, 399 U.S. 78 (1970), and Rule 12.1 of the Federal Rules of Criminal Procedure as reviewed in *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977) *cert. denied*, 439 U.S. 847 (1978). In the instant case, the record reflects that neither party specified who the alibi witnesses would be. Therefore, any contention that the prosecution failed to comply with a requirement to reveal rebuttal witnesses must emanate from the discovery motions and orders.

Mauricio requested "the names . . . of persons the State intends to call as witnesses . . . .," but received no corresponding written order from the court granting the request. The State requested ". . . the names . . . . of persons they or either of them [Defendants] intend to call as witnesses whether for direct testimony or impeachment purposes . . . .", and received a written corresponding order from the trial court granting the request.

Mauricio responded to the State's motion and the court's order by submitting a list of witnesses including the name of Janice Tuttle, but not specifying that Tuttle would provide the alibi testimony. The State responded to Mauricio's request by submitting a list of witnesses which did not include the name of Sharon McDonald, who testified in rebuttal to Mauricio's alibi witness. [From the record it is difficult at best to determine what was required pursuant to the discovery motions and orders.]

Absent statutory provisions to the contrary, parties in a criminal proceeding have never been required to divulge rebuttal witnesses. *Goldsby v. United States*, 160 U.S. 70 (1895); *United States v. Windham*, 489 F.2d 1389 (5th Cir. 1974); *Turner v. United States*, 441 F.2d 736 (5th Cir. 1971); *United States v. Angellini*, 607 F.2d 1305 (9th Cir. 1979). On at least two prior occasions, the Seventh Circuit has upheld the principles outlined in *Goldsby, supra*. In *United States v. Greene*, 497 F.2d 1068 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975), the court discussed the admissibility of the testimony of a witness who had not been disclosed on the witness list required because the Government was seeking the death penalty. In reaching its decision the court stated:

> "While the requirements of § 3432, if applicable are mandatory . . ., the requirement has been held inapplicable to rebuttal witnesses."

Greene, supra, at 1082 [Citations omitted]. Two years prior, the circuit court, in a similar case, cited *Goldsby* with approval stating no error arose from admitting the testimony of a witness whose name had not been disclosed to the accused because

"[i]t was offered merely to disprove a possible defense". *United States v. Hessler*, 469 F.2d 1294 at 1295 (7th Circuit 1972) *cert. denied* 409 U.S. 989 (1972).

While citing *Brady v. Maryland*, 373 U.S. 85 (1963), the Supreme Court in *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) succinctly held that in criminal proceedings the prosecution is not required to reveal inculpatory testimony:

> It does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably. There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; as the Court wrote recently, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . ."

See also, *Wardius v. Oregon*, 412 U.S. 470, 474 (1978). In *United States v. Myers*, 550 F.2d 1036, 1041 (5th Cir. 1977), the court described the duties of complying with Rule 12.1:

> Rule 12.1(a) of the Federal Rules of Criminal Procedure requires a defendant to disclose, upon receipt of a written government request, whether he intends to offer an alibi defense, the place where he claims to have been at the time the alleged offense was committed, and the *names and addresses of the witnesses* upon whom he intends to rely in attempting to establish his alibi. Section (b) of the Rule requires reciprocal disclosure of witnesses unearthed by the government, and section (c) makes the duty to disclose a continuing obligation for both parties. Section (e) authorizes the district court to excuse a party from compliance with the disclosure requirements upon a showing of good cause, and section (d) empowers him to penalize unexcused noncompliance by excluding the testimony of undisclosed witnesses. At issue here is the scope of the government's duty to disclose under section (b) and (c).
>
> The language to section (b) appears to require disclosure of two types of witnesses: (1) those relied upon "to establish the defendant's presence at the scene of the alleged offense", and (2) "*any other witness to be relied on*

to rebut testimony of any of the defendant's alibi witnesses."

(footnotes omitted, emphasis added).

Clearly, Rule 12.1 of the Federal Rules of Criminal Procedure is not analogous to IC 35-5-1-1, 2 and 3. While the federal provisions require an exchange of direct and rebuttal witnesses who will support or discredit an alibi, there is no such similar provision in the Indiana provisions. In *Myers*, it was the federal prosecutor who "triggered" the offering of an alibi defense by requesting the notice thereof, and it was the federal prosecutor who did not reciprocate in accordance with the clear tenets of the applicable federal statute. The court found the prejudice resulting from the prosecution's failure to reveal its alibi rebuttal witnesses *coupled with the weak case of the prosecution* all culminated in reversible error. *United States v. Myers*, 550 F.2d at 1043.

The instant case is more analogous to *United States v. Ortega-Chavez*, 682 F.2d 1086 (5th Cir. 1982). In *Ortega-Chavez*, the defendant without inducement by the federal prosecutor, offered his alibi defense and the name of his alibi witness. At trial the defendant put on his alibi defense by and through the testimony of his previously listed witness. The federal prosecutor in response called two previously undisclosed rebuttal witnesses to counter the alibi defense of the defendant. At 682 F.2d 1089, the court found that the federal prosecutor had made no demand for the defendant to offer his alibi defense and therefore was under no obligation to provide the names of its rebuttal witnesses. *See also United States v. Bouye*, 688 F.2d 471, 473 (7th Cir. 1982).

The Supreme Court has held that in reviewing such appeals, it should be kept in mind that the Constitution entitles a criminal defendant to a fair trial, not a perfect one. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *United States v. Hasting*, 461 U.S. 499, 508-509 (1983); *Bruton v. United States*, 391 U.S. 123, 135 (1968). In *Van Arsdall* the Court held that only in cases where the constitutional errors "are so fundamental and

pervasive that they require reversal without regard to the facts or circumstances of the particular case" will the the "harmless error" test be dispatched. *Van Arsdall* at 652, the Court cited only two examples of such error — denial of assistance of counsel at trial, and compelling a defendant to stand trial before a trier of fact who has a financial stake in the outcome.

Clearly in the instant case no such fundamental or pervasive error occurred. The complaint here is that inadmissible evidence was permitted into the record over Mauricio's objection. The evidence is argued to be inadmissible only because the witness's name was not revealed prior to trial. Nowhere is it argued the nature or merit of the testimony of McDonald was, or would have been under any guise, legally inadmissible. The only complaint is that Petitioner was not availed of an opportunity prior to trial to explore McDonald's testimony. Neither is this a case where the subject evidence was exculpatory and withheld by the design of the prosecutor. *Washington v. Texas*, 388 U.S. 14 (1967). Consequently, even if the state's failure to disclose was error no "fundamental" or "pervasive" error arose in this cause.

Further, the Seventh Circuit's decision contravenes in every critical aspect a prior decision of that Court. The decision in *Mauricio v. Duckworth*, Cause No. 86-1842 is irreconcilable with the decision of the Court in *Alicea v. Gagnon*, 675 F.2d 913 (7th Cir. 1982). In *Alicea* the Circuit Court held that failure to allow a criminal defendant the opportunity to present evidence supporting an alibi was unconstitutional, though harmless, due to substantial evidence of guilt. In *Mauricio*, the Circuit Court held that allowing a rebuttal witness to testify contradicting the accused's evidence of alibi was unconstitutional and harmful error because the name of the rebuttal witness was not provided the accused prior to trial.

Of special concern is the fact the evidence of guilt in both cases was essentially the same. In *Alicea* and *Mauricio* the defendants were identified and tied to the crime by the description of their appearance, clothing and vehicle. According to the Circuit Court, the jury in Alicea's trial would have had to

conclude that someone of similar build stole defendant's car and clothes in order to find Alicea not guilty. The Court found "it impossible that a jury would believe such strange misfortunes could befall any man." *Alicea* at 925. Yet in *Mauricio*, the Circuit Court stated "as the Indiana Supreme Court stated, evidence of Mauricio's identification was 'circumstantial'. [citation omitted] *Mauricio*, Slip op. at 11. These two decisions are simply irreconcilable.

SUMMARY

First, the Circuit Court erred in holding it constitutional error to withhold the name of a rebuttal witness by reason of the principle of reciprocal discovery where an alibi witness is not identified and the identity of the potential rebuttal witnesses are not specifically requested. This determination is contrary to decisions rendered by this Court. Second, the Circuit Court erred in contradicting its prior decision in finding the error in this cause harmful, as the evidence of guilt was as substantial in this case as it was in the prior decision. Wherefore, the Petitioners respectfully pray the Court grant this Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

Appendix

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

April 12, 1988.

Before
HON. WILLIAM J. BAUER, Chief Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. WILBUR F. PELL, JR., Circuit Judge

ARNOLD MAURICIO, JR., *Petitioner-Appellant*	) Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 86-1842 vs.	
JACK R. DUCKWORTH, and INDIANA ATTORNEY GENERAL, *Respondents-Appellees.*	) No. 85 C 523 Allen Sharp, *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Jack R. Duckworth and Indiana Attorney General, Respondents-Appellees, all of the judges on the original panel having voted to deny the same and no judge in active service having requested a vote on the suggestion for rehearing *en banc*,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing, and the suggestion for rehearing *en banc* be, and the same is hereby, DENIED.

In the
United States Court of Appeals
For the Seventh Circuit

No. 86-1842

ARNOLD MAURICIO, JR.,

Petitioner-Appellant,

v.

JACK R. DUCKWORTH, AND INDIANA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 85 C 523—**Allen Sharp,** *Judge.*

ARGUED NOVEMBER 17, 1987—DECIDED FEBRUARY 10, 1988

Before BAUER, *Chief Judge,* COFFEY, *Circuit Judge,* and PELL, *Senior Circuit Judge.*

PELL, *Senior Circuit Judge.* Petitioner-appellant, Arnold Mauricio (hereinafter Mauricio), appeals from the district court's order denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Although the district court agreed with Mauricio's claim that the State's knowing failure to disclose the identity of an alibi rebuttal witness was a violation of due process, the court nevertheless concluded that the prosecution's transgression amounted to harmless error. *Mauricio v. Duckworth,* 633 F. Supp. 1302 (N.D. Ind. 1986).

I.

Mauricio is presently serving a determinate 30-year sentence at the Indiana State Prison after being convicted by a jury of aiding felony murder and robbery. These convictions were affirmed on appeal by a 3-to-2 vote of the Indiana Supreme Court. *Mauricio v. State*, 476 N.E.2d 88 (Ind. 1985).

The underlying facts of Mauricio's crimes as fairly established by evidence at trial are as follows. On February 3, 1982, at approximately 8:00 p.m., Nancy Rehm, the decedent, and two other students at the Indiana Institute of Technology in Fort Wayne, Rhonda Unverferth and Joann Wenning, were stopped and ticketed by a policeman for driving snowmobiles in the street. Having been ordered by the officer not to drive farther in the street, the young women dismounted their vehicles and waited for Nancy's father, whom they had phoned, to retrieve both them and their snowmobiles. Suddenly, the students were approached by Mauricio's brother, Mark, and by a taller man alleged to be the petitioner, Mauricio. This second individual was never positively identified by the women due to his having worn a ski mask which covered his entire face. The women declined to enter into conversation with the men, who then approached the snowmobiles and instructed the women to start the vehicles. The women refused. Mark and Nancy then commenced pushing one another upon which Mark pulled a gun and fired a single shot into the ground. While the other students ran for help, two more shots rang out, causing Rhonda to return to the scene where she observed Mark still struggling with Nancy. Meanwhile, the individual accompanying Mark got onto one of the snowmobiles and drove away. Rhonda attempted to give chase but to no avail. Upon returning to the scene, Rhonda found Nancy lying face up in the middle of the street. Mark, while nowhere in the immediate vicinity, was quickly apprehended a few blocks away and positively identified. Nancy Rehm died the next day as the result of a single gunshot wound to the head.

At roughly 9:30 p.m., shortly after the third student, Joann Wenning, returned to the crime scene, a Fort Wayne policeman, Robert Lalone, was riding in a tow truck responding to snow emergencies when he observed a young man riding his snowmobile in the street. As yet unaware of the shooting involving Nancy Rehm, Lalone ordered the young man to get off the street. Three or four minutes after Lalone left the scene of this encounter, he received word over his radio of the shooting. The next morning, the snowmobile taken by Mark's confederate was located on the same street and within one block of petitioner Mauricio's house. Lalone subsequently identified Mauricio as the driver of the snowmobile he had stopped.

Both brothers were eventually indicted and tried together; their appeals from conviction were considered, and narrowly affirmed, in a single opinion by the Indiana Supreme Court.

After being formally charged but before trial, Mauricio filed with the trial court a motion for discovery which requested the names and addresses and prior statements of the witnesses the State intended to call at trial. The State filed a similar discovery request which sought, in addition, disclosure of any defenses Mauricio intended to use. Pursuant to the trial court's discovery order, Mauricio responded to the State's disclosure requests first on May 10, 1982, with a list of his potential witnesses and then on June 28, when he notified the State of his intention to rely upon an alibi. The State did not initially respond to Mauricio's discovery requests, but after two motions for the imposition of sanctions, the prosecution filed a response listing the names of some 59 potential witnesses. The name of the alibi rebuttal witness the State intended to call in the event Mauricio presented his alibi, however, was deliberately omitted from the State's witness list.

Trial commenced on November 16, 1982, and, consistent with his stated intention, Mauricio proffered an alibi based upon the testimony of Janice and William Tuttle and their

daughter Lisa Michaels, all of whom had been named on Mauricio's witness list. The Tuttles each testified that at the time of the crimes with which Mauricio was charged, they had observed him at the residence he shared with their daughter. Lisa Michaels corroborated her parents' testimony. At the conclusion of Mauricio's case, the State called its previously unidentified witness, Sharon McDonald, to rebut the alibi offered by the defense. McDonald, who was flown back to Indiana by the prosecution from her new home in California, testified that the Tuttles' testimony placing Mauricio at home at approximately 9:20 p.m. on February 3 was false and that she had been present at a discussion between Lisa Michaels and Janice Tuttle during which they agreed to testify falsely in support of Mauricio's alibi. On cross-examination, McDonald admitted that she was first contacted by the prosecution concerning her willingness to testify as early as June of 1982, five months before trial and a full month before the State tendered its witness list.

Mauricio moved to have the testimony of Sharon McDonald stricken from evidence or, alternatively, for a mistrial on the grounds that the State's use of McDonald's testimony violated the discovery order and constituted a violation of due process. The State responded by arguing that it had no obligation to divulge the identity of its rebuttal witnesses. The trial court denied both of Mauricio's motions. On appeal to the Indiana Supreme Court, a 3-to-2 majority held that because the scope of Mauricio's witness discovery request was unclear and because Mauricio had failed to request a continuance to enable him to investigate and possibly impeach the testimony of McDonald, there was no error upon which to base a reversal of the trial court. *Mauricio v. State*, 476 N.E.2d at 94.

With no further recourse available to him in Indiana,[1] Mauricio filed the instant habeas petition in federal district court in September 1985. The district court denied the petition on May 2, 1986, concluding that, although the State's failure to provide the defense with the identity of its alibi rebuttal witness had deprived Mauricio of his right to due process,

> [t]here does not exist a substantial possibility that the error complained of affected the verdict or that the error denied the petitioner a fundamentally fair trial. The error was harmless beyond a reasonable doubt.

Mauricio v. Duckworth, 633 F. Supp. at 1311. On appeal, this court is presented with two questions: First, was the State's knowing failure to divulge the identity of Sharon McDonald as a potential alibi rebuttal witness a violation of due process? Second, if so, was the district court correct to conclude that that constitutional violation was, on these facts, harmless?

II.

In *Wardius v. Oregon*, 412 U.S. 470 (1973), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless recip-

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[1] In addition to direct appeal, Indiana permits collateral review of convictions by resort to its Post-Conviction Remedy Rule 1. Accordingly, allegations that a defendant was convicted in violation of the Due Process Clause of the Constitution must ordinarily be brought in state court pursuant to Post-Conviction Rule 1 before the doctrine of exhaustion of state remedies will permit the filing of a petition for a writ of habeas corpus in federal court under 28 U.S.C. § 2254. However, where, as here, the grounds asserted for habeas relief are identical to the contentions urged in Mauricio's unsuccessful direct appeal to the Indiana Supreme Court, we have previously held that no useful purpose is served by requiring resort to Post-Conviction Rule 1 as a condition of exhaustion. *See Montes v. Jenkins*, 581 F.2d 609, 611 (7th Cir. 1978).

rocal discovery rights are given to criminal defendants. *Wardius* involved Oregon's criminal pre-trial discovery procedures, which required a defendant to provide the prosecution with notice of any alibi upon which the defendant intended to rely, as well as with the names of any and all witnesses who would testify in support of such an alibi. The Oregon discovery scheme contained no reciprocal provision requiring the State to divulge the identity of witnesses it planned to call to refute a proposed alibi. Because of this disparity, the Court in *Wardius* reversed the conviction of the petitioner, concluding that it was a violation of due process to compel a defendant to reveal the particulars of his alibi defense without giving him an equal opportunity to discover the State's rebuttal witnesses. *Id.* at 479.

This court has previously determined that the scheme at issue in the instant case, unlike the statutory procedure in dispute in *Wardius*, is not unconstitutionally nonreciprocal on its face. *See Bruce v. Duckworth*, 659 F.2d 776, 782 (7th Cir. 1981). Indiana's criminal discovery procedure neither requires the defense to list the witnesses it expects to call in support of its alibi, *see* I.C. § 35-36-4-1,[2] nor compels the State to enumerate its alibi rebuttal witnesses, *see* I.C. § 35-36-4-2.[3] While acknowledging the con-

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[2] Indiana Code § 35-36-4-1, the wording but not the substance of which has been amended since Mauricio's indictment, requires defendants who intend to offer evidence of an alibi to abide by the following procedure:

> Whenever a defendant in a criminal case intends to offer in his defense evidence of alibi, the defendant shall . . . file with the court and serve upon the prosecuting attorney a written statement of his intention to offer such a defense. The notice must include specific information concerning the exact place where the defendant claims to have been on the date stated in the indictment or information.

[3] In the appropriate circumstances, pursuant to I.C. § 35-36-4-2, (also modified slightly since the date of Mauricio's indictment) the State's responsibility in response to a defendant's notice of alibi is as follows:

(Footnote continued on following page)

stitutionality of and the reciprocity inherent in Indiana's alibi discovery scheme as enacted, the district court found nevertheless that the discovery procedures were not applied evenhandedly in Mauricio's case. Thus, although the relevant Indiana alibi statutes do not explicitly impose upon parties an affirmative obligation to disclose alibi and alibi rebuttal witnesses, the district court found that, in the circumstances presented by this case, the trial court's discovery order requiring the defense to list *all* its witnesses should have triggered a corresponding and reciprocal obligation on the part of the State to list *all* its potential witnesses—including likely rebuttal witnesses.[4] In the opinion of Judge Sharp, the trial court's failure to require the State to divulge the identical information it required from the defense altered the balance struck by the statutory discovery provisions and created instead the same type of nonreciprocal discovery scheme held unconstitutional by the Supreme Court in *Wardius*.

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[3] *continued*

(a) When a defendant files a notice of alibi, the prosecuting attorney shall file with the court and serve upon the defendant, or upon his counsel, a specific statement containing:

(1) The date the defendant was alleged to have committed the crime; and

(2) The exact place where the defendant was alleged to have committed the crime;

that he intends to present at trial. . . .

[4] The State argues that the extent of pre-trial disclosure required of each party should be determined by the scope of each side's actual discovery requests. In this case, the State makes much of the fact that it expressly requested of Mauricio the names of witnesses the defense intended to call for direct *and* for impeachment testimony, while Mauricio's discovery request merely sought the names of witnesses the State intended to call with no specific reference to rebuttal witnesses. The State's argument, in our view, misperceives the essential nature of the discovery process inasmuch as it portrays discovery as a sort of contest rather than as a level playing field where rules are in place to ensure *equal* access to material information instead of to encourage deftly worded motions in an attempt to outmaneuver the other side.

The State argues that its failure to disclose the identity of McDonald did not amount to a deprivation of Mauricio's right to due process. First, the State asserts that the voluntary disclosure by the defense of its alibi witnesses should not give rise to any corresponding obligation on the part of the prosecution to divulge the identity of its alibi rebuttal witnesses—especially when the State is under no such statutory duty.[5] Second, the State contends that it should not have had to identify explicitly its alibi rebuttal witness because, rather than expressly identifying its own alibi witnesses, the defense merely included the names of its alibi witnesses in the list of witnesses submitted pursuant to the trial court's discovery order. As the district court correctly concluded, neither of these arguments is persuasive.

As an initial matter, Mauricio did not voluntarily reveal the names of his alibi witnesses; instead, in abiding by the letter and spirit of the trial court's discovery order, the defense produced ". . . the names and last known addresses of persons [it] intend[ed] to call as witnesses whether for direct testimony or impeachment purposes . . . ." Compliance with the trial court's discovery order is clearly not the same as a gratuitous disclosure by Mauricio of the identity of his alibi witnesses. Moreover, it is precisely because the disparity in the scope of discovery permitted each side resulted from the trial court's discov-

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[5] The fact that the State is not expressly required by statute to disclose the identity of its alibi rebuttal witnesses is not, in and of itself, dispositive of the State's discovery responsibilities. As this court has previously held:

> *Wardius* makes clear that any procedure denying reciprocal discovery rights . . . whether expressly pursuant to a statute *or judicially created*, fails to satisfy the due process requirement of the Fourteenth Amendment.

United States ex rel. Veal v. DeRobertis, 693 F.2d 642, 647 (7th Cir. 1982) (emphasis supplied). Of course, in the instant case it is not the alibi statute that is nonreciprocal but rather the application of the statutory scheme by the trial court.

ery order, rather than from some spontaneous act on the part of the defense, that the fairness of Mauricio's trial is called into question and a violation of due process arises.[6]

The State's alternative claim, that it should be altogether excused from having to disclose the identity of its alibi rebuttal witness because Mauricio did not specifically identify his alibi witnesses, is similarly unpersuasive and fails to appreciate the precise degree of reciprocal discovery required by *Wardius*. The district court decision is devoid of language suggesting that the State was required to underscore the particular identity of Sharon McDonald as an alibi rebuttal witness. The State was obliged simply to include McDonald's name in its witness list, in the same fashion that Mauricio provided the names of his alibi witnesses, leaving it to the industriousness of the defense to discern through investigation the nature and substance of McDonald's probable testimony. In these circumstances, reciprocity dictated only that the defense be entitled to the same scope of discovery to which the prosecution was entitled, nothing less, nothing more. Because the trial court's discovery order, in effect, permitted the State ac-

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[6] That the trial court improperly applied the State's discovery rules does not, without more, amount to a violation of fundamental fairness rising to the level of an infringement of due process. What makes the procedural error one of constitutional dimension is that the failure of the trial court to order disclosure of the identity of *all* of the prosecution's witnesses, including, if any, alibi rebuttal witnesses, deprived the defense of critical information it was entitled to have and to consider in making the strategic decision whether or not to present an alibi defense.

Furthermore, both the Indiana Supreme Court majority and the district court contend that since Mauricio failed to request a continuance in order to investigate the credibility of the State's surprise witness, he cannot now seek to have the withholding of that witness' identity declared a violation of due process. We disagree. Mauricio should have had the opportunity *pre-trial* to make a fully informed decision as to whether or not to put on an alibi defense. In the circumstances presented by this case, Mauricio's decision should have been informed by timely consideration of the existence of any prosecution alibi rebuttal witness.

cess to information it did not also afford Mauricio, full reciprocity, as mandated by *Wardius*, cannot be said to have characterized the discovery process and consequently due process was denied.[7]

Finally, with respect to the question of a due process violation, we take exception to the State's assertion at oral argument that a decision to grant Mauricio's petition for a writ of habeas corpus amounts to letting a guilty felon "escape justice" by means of a "fabricated alibi." This charge is all the more remarkable coming as it did on the heels of a candid, if extremely reluctant, admission by counsel for Indiana that, in his opinion, the State's knowing failure to disclose the identity of Sharon McDonald as a potential witness was a violation of the State's discovery rule. Certainly, we cannot say from our vantage point whether or not Mauricio's alibi was true. Neither can we be confident, especially in light of the State's deliberate sandbagging, that the jury was in any position to evaluate impartially the veracity of the proffered alibi. What we can say with certainty, however, is that pretrial disclosure of McDonald's existence as a potential witness would have afforded the defense ample opportunity, pursuant to Indiana's rules of criminal procedure, to depose her and to prepare in an orderly fashion for her possible cross-examination. Thus, the plainly prejudicial effect of the prosecution's deliberate decision to omit the name of Sharon McDonald from its witness list requires that we do more than simply conclude that Mauricio should have resorted to the procedural remedy of seeking a continuance in what would have been a desperate

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[7] The State is correct to observe that there is no constitutional right to discovery in criminal cases. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *see also United States ex rel. Jones v. DeRobertis*, 766 F.2d 270, 274 (7th Cir. 1985). However, where state statutes or rules do provide for criminal discovery, *Wardius* clearly requires, at least with respect to alibi rules, that such a procedure impose similar obligations and yield substantively similar information.

attempt, apparent to the jury, to mitigate the damage inflicted by the devastating rebuttal testimony of the State's surprise witness.

III.

Notwithstanding its finding that the State's procedural error violated Mauricio's constitutional right to due process, the district court went on to hold that that error, when viewed in the context of the trial record as a whole, was "harmless beyond a reasonable doubt." *See Chapman v. California*, 386 U.S. 18, 24 (1967). We disagree.

In *United States ex rel. Savory v. Lane*, 832 F.2d 1011 (7th Cir. 1987), we held that in assessing whether errors of constitutional magnitude, such as the one at issue here, are harmless beyond a reasonable doubt, "we must determine 'whether there is a reasonable possibility that the [errors] complained of might have contributed to the conviction.' " *Id.* at 1019 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). In essence, the inquiry comes down to the question, "whether absent the constitutionally-forbidden evidence, honest and fair-minded jurors might very well have brought in not-guilty verdicts." *Burns v. Clusen*, 798 F.2d 931, 943 (7th Cir. 1986) (citing *Chapman*, 386 U.S. at 25-26). Typically, we require other evidence of guilt to be "overwhelming" before concluding a constitutional error was harmless. *Savory*, 832 F.2d at 1020; *United States v. Shue*, 766 F.2d 1122, 1132-33 (7th Cir. 1985); *United States ex rel. Burke v. Greer*, 756 F.2d 1295, 1302 (7th Cir. 1985).

Any recapitulation of the evidence adduced at Mauricio's trial must begin with an acknowledgment that, as the Indiana Supreme Court stated, evidence of Mauricio's identification was "circumstantial." 476 N.E.2d at 91. In fact, neither of the witnesses to the crimes for which Arnold Mauricio was convicted could positively identify him as having been at the crime scene. Whoever accompanied Mark Mauricio on the night of February 3, 1982 was wearing a ski mask. If this fact alone were not suffi-

cient to demonstrate that the State's evidence falls short of being "overwhelming", also questionable is the eyewitness identification of Mauricio by Officer Lalone, who identified Arnold Mauricio as the individual he stopped from riding his snowmobile in the street. On cross-examination, however, Lalone admitted to having mistakenly identified Mauricio to his partner, at a time when Mauricio had been incarcerated, as a man emerging from the county office building.

The State attempts to minimize these weaknesses in its case by asserting that, although no one piece of evidence is sufficiently probative of Arnold Mauricio's guilt to warrant the conclusion that the jury would definitely have convicted him in the absence of Sharon McDonald's rebuttal testimony, the cumulative weight of the evidence does require such a conclusion. In addition to the testimony of the State's occurrence witnesses and the testimony of Officer Lalone, the State points to the following "inculpatory" evidence: (1) Arnold Mauricio was known to have been in the company of his brother Mark approximately seven hours prior to the time of the crimes charged; (2) Mark Mauricio admitted to owning a gun of the same caliber as the gun used to kill Nancy Rehm; and (3) a snowmobile matching the description of the one stolen from Nancy Rehm was found the day after her murder just one block from Arnold Mauricio's home. Although a jury confronted with the totality of the State's circumstantial evidence against Arnold Mauricio could view it as a satisfactory basis for finding him guilty, we are not sufficiently persuaded that the constitutional error complained of was harmless beyond a reasonable doubt. It is difficult to conceive of a more devastating revelation to a jury than that which occurred here. That an alibi was not only untrue but that it was planned by Mauricio's girlfriend and her mother, smacking as it does not only of wilfull perjury but possibly of conspiracy to suborn perjury, could not but have cast severe doubt on all other aspects of Mauricio's case.

Simply stated, absent McDonald's tainted rebuttal testimony, the State's case cannot fairly be described as "overwhelming", *see Savory, Shue* and *Burke*; and thus the district court erred in holding that the failure to disclose McDonald's identity constituted mere harmless error.

IV.

In conclusion, although we agree with the district court that the State's failure to disclose the identity of Sharon McDonald violated Arnold Mauricio's right to a fundamentally fair trial and hence to due process of law, we disagree that that constitutional procedural error amounted to no more than harmless error. Accordingly, we grant the petition for a writ of habeas corpus unless the State of Indiana convenes a new trial of Mauricio within ninety days after this order becomes the final judgment of this court.

REVERSED AND REMANDED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ARNOLD MAURICIO, JR.

Petitioner

v. No. S 85-523

JACK R. DUCKWORTH,
INDIANA ATTORNEY GENERAL

Respondents

MEMORANDUM AND ORDER

This petition for writ of habeas corpus was filed pursuant to 28 U.S.C. § 2254 by Arnold Mauricio, Jr., an inmate incarcerated at the Indiana State Prison, in Michigan City, Indiana. The matter is now before this court on respondent's motion to dismiss, filed as part of their Return to Order to Show Cause. In accord with the dictates of *Townsend v. Sain*, 372 U.S. 293 (1963), the complete state court record has been filed with, and carefully examined by, this court.

A careful examination of the underlying state court record and the opinion of the Supreme Court of Indiana in *Mauricio v. State*, 476 N.E. 2d 88 (Ind. 1985), reveals that petitioner has exhausted his available state court remedies per 28 U.S.C. § 2254(b), (c); *Anderson v. Harless*, 459 U.S. 4 (1982). Both sides having briefed their respective positions, this petition is now ripe for ruling.

Petitioner was convicted in a state court jury trial of aiding felony-murder and robbery, for which he received a determinate sentence of thirty (30) years. These convictions were affirmed on appeal by the Supreme Court of Indiana. Petitioner now brings this petition for a federal writ of habeas corpus.

Petitioner raises the following issue in this application for habeas relief:

(1) Petitioner's constitutional right to due process was denied when the prosecutor refused to inform the defense of his rebuttal witness.

I.

Pursuant to Indiana statute I.C. § 35-5-1-1, petitioner informed the State of Indiana of his intent to use an "alibi" defense prior to the trial. In his notice he was required to set forth the exact place at which the petitioner claimed to be at the time of the incident, which he did. Petitioner in his notice sought reciprocal notice from the prosecutor. The prosecutor responded pursuant to the statute and provided petitioner with the information concerning the exact date, time and place of the incident.

Petitioner had also filed a motion for discovery previous to the trial requesting the names and addresses of witnesses the State intended to call at trial with their written statements or a summary of their oral statements. The State filed a motion for discovery requesting similar information. The court granted the State's motion for discovery. Petitioner filed a supplemental motion for discovery requesting exculpatory information. Petitioner next filed his response to the State's motion for discovery including a list of witnesses he intended to call including his alibi witnesses. The petitioner filed two motions for sanctions against the prosecutor for failure to comply with the discovery requests. The record is void of any order by the court granting petitioner's motions for discovery, but the petitioner claims that the court granted his motions orally. The prosecutor eventually provided petitioner with a list of fifty-nine (59) witnesses of which he called only twelve (12) at the trial, along with the rebuttal witness the prosecutor never disclosed to the petitioner prior to her testifying.

During the petitioner's case in chief he called Janice Tuttle, the mother of petitioner's girlfriend as a witness. Janice Tuttle testified that immediately prior to the specified time of the crime, between 9:15 and 9:30 P.M. on February 3, 1982, she personally observed petitioner at petitioner's residence along with her daughter, Lisa Michael.

After the petitioner had rested, the State called as a rebuttal witness Sharon McDonald. Sharon McDonald testified that Tuttle's testimony placing the petitioner at his residence at 9:30 P.M. on February 3, 1982 was preconcocted during a discussion between Lisa Michael and her mother on February 4, 1982 which McDonald overheard, and was untruthful. On cross-examination of McDonald, she testified that she had been contacted by the State in June of 1982. Petitioner then moved to strike the testimony of Sharon McDonald, or in the alternative moved for a mistrial. Petitioner argued in support that the State's use of McDonald's testimony was a violation of the discovery order. The State argued in response that it was not required to divulge its rebuttal witnesses. The trial court denied petitioner's motions. On appeal the Supreme Court of Indiana held that the trial court did not error in permitting the testimony by the rebuttal witness.

Respondents contend that the Indiana Statute for Alibi Notice is constitutional and provides due process. The respondents contend that under the analysis of *Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208 (1973), and more specifically the Seventh Circuit's holding in *Bruce v. Duckworth*, 659 F. 2d 776 (7th Cir. 1981), that the alibi statute in question is reciprocal and protects the defendant's due process rights.

In *Wardius v. Oregon*, *supra*, the Supreme Court addressed the issue of whether a State statute which required the defendant to disclose certain evidence in order to involve his alibi defense, but did not require reciprocal discovery from the prosecution violated the defendant's rights under the due process clause. The Court held that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants. In discussing the concept that liberal discovery promotes the ends of justice best by allowing each party to obtain the maximum amount of information possible in order to prepare their cases and thereby reducing the possibility of surprise during the trial the Court said:

> The growth of such discovery devices is a salutary

development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system. As we recognized in *Williams*, nothing in the Due Process Clause precludes States from experimenting with systems of broad discovery designed to achieve these goals. "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." 39 U.S., at 82 (footnote omitted), 90 S. Ct., at 1896.

Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, but *cf. Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), it does speak to the balance of forces between the accused and his accuser. *Cf. In re Winship*, 397 U.S. 358, 361-364, 90 S. Ct. 1068, 1070-1073, 25 L. Ed. 2d 368 (1970). The *Williams* Court was therefore careful to note that "Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant." 399 U.S., at 81 (footnote omitted), 90 S. Ct., at 1896. The same cannot be said of Oregon law. As the State conceded at oral argument, see Tr. of Oral Arg. 19, Oregon grants no discovery rights to criminal defendants, and, indeed, does not even provide defendants with bills of particulars. More significantly, Oregon, unlike Florida, has no provision which requires the State to reveal the names and addresses of witnesses it plans to use to refute an alibi defense.

We do not suggest that the Due Process Clause of its own force requires Oregon to adopt such provisions. Cf. *United States v. Augenblick*, 393 U.S. 348, 89 S. Ct. 528, 21 L. Ed. 2d 537 (1969); *Cicenia v. Lagay*, 357 U.S. 504, 78 S. Ct. 1297, 2 L. Ed. 2d 1523 (1958). But we do hold that in

> the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State. (footnotes omitted)

Wardius v. Oregon, 412 U.S. at 474.

The respondents do not contest these principles but rather contend the Indiana statute has carefully provided for reciprocal discovery. The Seventh Circuit in *Bruce v. Duckworth*, *supra*, addressed the issue of whether the statute on its face denies criminal defendants due process, and found that it does not. The Supreme Court of Indiana in *State ex rel Keller v. Criminal Court of Marion*, 262 Ind. 420, 317 N.E. 2d 433 (1974), applying the *Wardius* test held that the alibi statute was constitutional. Further, the Supreme Court of Indiana in addressing the same issue on direct appeal in *Bruce v. State*, 268 Ind. 180, 375 N.E. 2d 1042 (1978), held that the alibi statute does require reciprocal discovery to the extent reasonably possible.

The Indiana alibi statute, as set forth in I.C. § 35-5-1-1, which petitioner challenges reads:

> 35-5-1-1 [9-1631]. Notice to prosecuting attorney when evidence of alibi to be offered — Exception. — Whenever a defendant in a criminal case in a court other than that of a justice of the peace shall propose to offer in his defense evidence of alibi, the defendant shall, not less than ten [10] days before the trial of such cause, file and serve upon the prosecuting attorney in such cause a notice in writing of his intention to offer such defense. The notice shall include specific information in regard to the *exact place* at which time the defendant claims to have been at the time stated in the indictment or information as the time of such offense. The provisions of this chapter shall not apply in

> case the court sets the trial for a date less than fourteen [14] days ahead. [Acts 1935, ch. 228 § 1, p. 1198; 1974, P.L. 143, § 36, p. 604.] (emphasis added)

IC 35-5-1-2 placed a reciprocal burden upon the prosecutor:

> 35-5-1-2 [9-1632]. Request to prosecuting attorney for statement of exact date and place of offense — Second notice by defendant. — In the defendant's notice, required under this chapter, the defendant may also *expressly require* the prosecuting attorney to file and to serve upon the defendant or upon his counsel a specific statement in regard to the *exact date* which the prosecution proposes to present at the trial as the date when, and the *exact place* which the prosecution proposes to present at the trial as the place where the defendant was alleged to have committed or to have participated in the offense.

IC 35-5-1-3 placed equal sanctions upon the defendant or prosecutor upon their failure to comply with the above statutes:

> Failure to file notices and statements — Evidence excluded. — In the event of the failure of the defendant to file and to serve the defendant's original notice, as prescribed herein or the defendant's second notice as prescribed herein, or in the event of the failure of the prosecuting attorney to file and to serve the prosecuting attorney's statement as prescribed herein, the court may in its discretion extend the time for filing the same. At the trial, if it appears that the defendant has failed to file and to serve upon the prosecuting attorney the defendant's original notice of alibi as prescribed herein, the court shall, in the absence of a showing of good cause for such failure by the defendant, exclude evidence offered by the defendant to establish an alibi. At the trial, if it appears that the prosecuting attorney has failed to file and to serve upon the defendant or upon his counsel the prosecuting attorney's statement as prescribed herein, the court shall, in the absence of a showing of good cause for such failure by the prosecuting attorney, exclude evidence offered by the prosecuting attorney to show that the defendant was at a place other than the place stated in the defendant's

> original notice and that the time was other than the time stated in the defendant's original notice. At the trial, if it appears that the defendant has failed to file and to serve upon the prosecuting attorney(,) the defendant's second notice as prescribed herein, the court shall, in the absence of a showing of good cause for such failure by the defendant, exclude evidence offered by the defendant to establish that he was at a place other than the place specified in the prosecuting attorney's statement, and that the time was other than the time stated in the prosecuting attorney's statement. [Acts 1935, ch. 228, § 3, p. 1198.]

The current alibi statutes are found at IC 35-36-4-1 et seq.

In reviewing the Indiana statute in light of *Wardius* and *Bruce* it is clear that the statute presents a balance of discovery for both parties to the extent of which discovery is required, and on its face does not deny petitioner due process. Therefore, petitioner's argument of denial of due process based upon the claim that the Indiana alibi statute is not reciprocal must fail.

II.

The court must then turn to petitioner's dues process claim grounded in the right to reciprocal discovery in general, under the Fourteenth Amendment. Petitioner filed a motion for discovery. He filed two verified motions for sanctions against the prosecutor for failure to comply stating the court orally granted the discovery motion. The respondents claim that the record is void of any order granting the motion. However, the record is also void of statements or evidence to the contrary. The verified pleading of the petitioner states the motion for discovery was granted orally. Nowhere in the record does the prosecutor dispute this, nor does the trial court state otherwise. At some point in time, particularly on July 20, 1982, the prosecutor acting on the representation of the petitioner's counsel that an oral order existed, recognizing some type of duty with regard to discovery, or in a "voluntary" action, filed a long witness list of fifty-nine (59) names, of which he called only twelve (12) at trial along with the rebuttal witness.

The respondents contend that petitioner "voluntarily" disclosed the names of his alibi witnesses. However, respondents have overlooked the fact that the petitioner was ordered by the court, in writing, to provide a list of witnesses, names and addresses, which the petitioner intended to call at trial for either direct or impeachment purposes. Petitioner complied with the order. Respondents' statement that petitioner "voluntarily" provided the names of the alibi witnesses is not accurate.

Respondents further argue since the alibi statute does not require the State to specify rebuttal witnesses nor did petitioner specifically request a list of rebuttal witnesses, under Indiana law the State was not required to provide such information. It is interesting to note the State's backdoor argument-claiming petitioner did not specifically request information on rebuttal witnesses since the State never complied with either of petitioner's motions for discovery or respond to his motions for sanctions. Respondents' argument based on that reason wholly fails to persuade this court. Likewise, respondents' reliance on the alibi statute as not requiring the State to provide rebuttal witness information must fail. This court has previously stated that the alibi statute is balanced to the extent that it requires reciprocal discovery. The statute neither requires the defense to list witnesses it expects to call to support the alibi, nor does it require the State to list rebuttal witnesses to the alibi. Even though the alibi statute does not require such discovery, it does not preclude the right of a criminal defendant to reciprocal discovery in his case.

The prosecutor stated that he had his first conversation with the rebuttal witness on June 29, 1982, and when filing his halfhearted attempt to respond to the petitioner's discovery request on July 20, 1982, in which he did not list the rebuttal witness, he indicated that he omitted her name, although he was fully aware of the fact that he would call her if the petitioner presented his alibi defense on the belief that "they have no right to know my rebuttal witnesses." Justice DeBruler, in his dissenting opinion in which Justice Prentice concurred, stated:

> Her omission from the list and the failure to disclose her before she was called to the witness stand were obviously intentional, and done in the belief that there was no legal requirement upon the prosecution to divulge her intended use as a witness. In this the prosecution was wrong."

Mauricio v. State, 476 N.E. 2d at 95.

This court fully agrees with the analysis of Justice DeBruler. Petitioner sought discovery and sanctions for failure to comply with discovery. Petitioner disclosed, pursuant to court order, the witnesses he intended to call at trial, which list included his alibi witnesses. He also objected to the testimony of the rebuttal witness on the basis of the omission of her as a witness in the written response the prosecution did file. Petitioner also moved to strike her testimony and for a mistrial. He was denied both motions.

The Supreme Court of Indiana, in the majority opinion, held that since petitioner's discovery request was not clear on the record and since there was no proof of request for a continuance when the testimony was offered there was no error. The Court cited the holding in *Reid v. State*, 267 Ind. 555, 372 N.E. 2d 1149 (1978), wherein it states that where the record shows clearly that there was a request for discovery of witnesses and rebuttal witnesses were well known to the State, there is a duty to provide them, citing, *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963). However, the Court found applying the principle enunciated in *Morgan v. State*, ____ Ind. ____, 440 N.E. 2d 1087 (1982), that although discovery matters are generally discretionary with the trial court it is ordinarily considered improper for a trial court to allow a witness who was not listed in discovery to testify unless the remedy of a continuance is granted to the other party to meet such testimony, coupled with the holding in *Smith v. State*, ____ Ind. ____, 439 N.E. 2d 634 (1982), that an exception to this rule is where the witness is brought in on rebuttal, that the facts in this case did not violate petitioner's due process rights. This court respectfully disagrees.

The prosecution was fully aware of its intent to use the rebuttal witness long before the trial and special arrangements were made to transport the witness from California to Indiana for the trial. And as Justice DeBruler, stated,

> In true "poker game" fashion she was dealt to the defense as a rebuttal witness on November 19, 1982. This maneuver of the prosecution denied reciprocal discovery rights to appellant. Knowledge of the prosecution's plan would have aided appellant in designing his defense, and that impingement could not be remedied by a continuance.

Mauricio v. State, *supra* at 95, dissenting opinion. Justice DeBruler then went on to cite four Indiana cases stating that the granting of a new trial is not foreclosed by these prior cases (which have held that rebuttal witnesses need not have been disclosed by the prosecution, even in the alibi situation) since in none of those cases was the scope of defense discovery so clearly beneath the level required by due process of law and the reciprocity measure that due process utilizes.

In *Reid v. State*, *supra*, the Supreme Court of Indiana held that a continuance was the appropriate remedy for an opponent's failure to compy with a discovery order. The Court held that a continuance was appropriate, assuming that the damage may, thereby, be averted without unreasonable delay or judicial waste. However, the *Reid* Court held that it is conceivable that the violation could be so misleading as to require exclusion of the concealed evidence, as being the only way to avoid a denial of the defendant's fair trial rights. *Id.*, at 1155. The Court in the underlying opinion here found that there was no violation denying petitioner a fair trial, and thus, no requirement to exclude the evidence existed.

This court in particular notes the language in *United States v. Agurs*, *supra* at 110:

> Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file he sould be presumed to recognize its significance

> even if he has actually overlooked it. Cf. *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104. Conversely, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor. (footnote omitted).

This court concludes in light of the fact in this case that petitioner was entitled to reciprocal discovery in order to assure his due process rights. The prosecutor failed to disclose the rebuttal witness with the full intent not to do so. Although the alibi statute was applied in a balanced fashion, the discovery procedures were not equally applied. The trial court entered a written order granting the State's motion for discovery, and did not impose any reciprocal duty on the State, even in light of the motions for sanctions. Even if one were to assume there existed an oral order granting petitioner's motions for discovery the State failed to comply other than providing the list of fifty-nine (59) witnesses. The State was well aware of its intent to call the rebuttal witness long before the trial even though the State would only call the rebuttal witness in the event petitioner presented his alibi defense. Petitioner was entitled to reciprocal discovery and the failure to provide reciprocal discovery amounted to a violation of his due process rights.

Having determined that petitioner was entitled to the rebuttal evidence, this court most now determine whether the failure to disclose that information constituted a denial of fundamental fairness. This court must evaluate the failure to disclose the name of the rebuttal witness in the context of the entire record. *United States v. Agurs*, *supra*. There is no constitutional right to discover evidence favorable to the state in a criminal case. *Wardius v. Oregon* (cite omitted), so the inability of a defendant to interview witnesses is a constitutional problem only if the state artificially restricted the defen-

dant's ability to obtain evidence. *United States ex rel Jones v. DeRobertis* 766 F. 2d 270 (7th Cir. 1985) citing *United States v. White*, 454 F. 2d 435 (7th Cir. 1971), *cert. denied*, 406 U.S. 962 (1972). All rebuttal evidence is not discoverable, some simply is unknown or the relevance not ascertained soon enough to be of beneficial use to the opposing party.

In essence the petitioner claims that he was unfairly and prejudicially surprised by the State's rebuttal witness because he had made several tactical judgments-including the decision to assert the alibi defense-in reliance on the State's list of fifty-nine (59) witnesses. The State had the benefit of non-reciprocal discovery rights. In *Brady v. Maryland*, the Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The Court further stated that a prosecution that withholds evidence on demand of accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . *Brady v. Maryland*, *supra* at 87.

The line of cases on which the petitioner relies, *Brady*, *Agurs*, and their progeny, involved the disclosure of exculpatory evidence. This case does not involve the failure to disclose exculpatory evidence, rather it involves the failure to disclose alibi rebuttal evidence. Neither does this case involve improper prosecutorial remarks as is the basis for the majority of the cases. The Seventh Circuit Court of Appeals in *United States v. Cerro*, 775 F. 2d 908 (7th Cir. 1985), stated at 916:

> Most cases of harmless error involve the erroneous admission of evidence favorable to the prosecution. As a practical matter, if the evidence of guilt that was neither erroneously admitted nor tainted by the erroneously admitted evidence is overpowering, and the tainted evidence neither probative nor inflammatory (inflammatory evidence might overbear the judgment of a lay trier of

fact), so that the appellate court can safely conclude that the likelihood that the defendant would have been acquitted is very small — too small to warrant the delays and other costs entailed by ordering a new trial — the error will be pronounced harmless (harmless beyond a reasonable doubt, if the appellate court is strongly convinced of its conclusion).

III.

The standard this court must apply is whether the constitutional error in this case was harmless error beyond a reasonable doubt. *Chapman v. State of California*, 386 U.S. 18, 87 S. Ct. 824 (1967). Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations. *Delaware v. Van Arsdall*, ____ U.S. ____, ____ S. Ct. ____, Slip opinion No. 84-1279 (April 7, 1986), *United States v. Hastings*, 461 U.S. 499, 193, S. Ct. 1974 (1983). The question now becomes: with the disclosure of the rebuttal witness, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty? *See, United States v. Hastings*, at 1981, citing *Harrington v. California*, 395 U.S. 250, 89 S. Ct. 1726 (1969).

To satisfy its burden, the prosecution must do more than demonstrate by circumstantial evidence that the defendant's guilt exists. Rather, the case against the defendant must be "overwhelming" in order to apply the harmless error rule. *United States ex rel Burke v. Greer*, 756 F. 2d 1295 (7th Cir. 1985); *Fencl v. Abrahamson*, 628 F. Supp. 1379 (E.D., Wis., 1986). *See also U.S. ex rel Miller v. Greer*, ____ F. 2d ____, Slip opinion No. 84-2679 (7th Cir. April 9, 1986).

It is the position of the petitioner that had he known of the rebuttal witness, he would not have presented an alibi defense since it was his belief that the state's case-in-chief was weak. A full summary of the facts is set forth in the State court opinion, and this court need no restate all those facts here. The facts relevant to petitioner which inculpate him are as follows. Two witnesses identified petitioner's brother as the trigger man,

and the same two witnesses gave a description of the co-perpetrator which matched the petitioner. Petitioner was known to have been with his brother in the afternoon of the shooting. A .25 caliber pistol was the weapon used to kill the victim, and petitioner's brother testified that such a caliber weapon was in his household. A police officer testified that just minutes following the murder he stopped an individual on a snowmobile observed riding on a street in the vicinity of the crime and running a red light. The officer positively identified the operator of the snowmobile to be petitioner. He further testified that the snowmobile matched the description of the one stolen from the victim. The stolen snowmobile was found the next morning just one block from the petitioner's home.

The Supreme Court of Indiana held that the appropriate step for petitioner to take if he was truly surprised by the rebuttal witness was to seek a continuance. Petitioner argued that a continuance would have been futile since he had already presented his alibi defense. However, if petitioner's alibi was true, a continuance would have given petitioner time to investigate the rebuttal witness, talk to his own alibi witnesses in detail and then challenge the credibility of the rebuttal witness. If on the other hand, petitioner would not have presented his alibi defense because it was a false alibi, petitioner does not have any right to present a false alibi.

Petitioner did present an alibi defense and the rebuttal witness was allowed to testify. The evidence was before the jury and the question for the jury was one of credibility and weight to be given to the witness' testimony.

This court finds that the failure to disclose the name of the rebuttal witness under the facts in this case was a violation of the due process clause. This court also finds in evaluating this case on the entire record that the undisclosed evidence was not exculpatory in nature or material to punishment, that the inculpatory evidence against the petitioner was overwhelming, that petitioner did not avail himself of the opportunity to investigate the rebuttal witness, and that petitioner was not artifically restricted from obtaining the evidence testimony to

the extent that he was in the best position to examine and prepare his alibi defense. There does not exist a substantial possibility that the error complained of affected the verdict or that the error denied the petitioner a fundamentally fair trial. The error was harmless beyond a reasonable doubt.

Although somewhat "ancient" now this court has been and is aware of the contents of an article by Honorable James Duke Cameron (and his law clerk) entitled "When Harmless Error Isn't Harmless", Arizona State University Law Journal, 1971, pp. 23-42. Notwithstanding the influences of that article, past and present, this court here concludes that the error here was, indeed, harmless beyond a reasonable doubt.

Accordingly, it is the order of this court that respondents' motion to dismiss be and is hereby GRANTED; writ is hereby DENIED; petition is ordered DISMISSED. SO ORDERED.

Enter May 2, 1986.

/s/ Allen Sharp
Chief Judge
United States District Court

CIV. 31
(Rev. 5/85)

JUDGMENT IN A CIVIL CASE

United States District Court	DISTRICT NORTHERN DISTRICT OF INDIANA SOUTH BEND DIVISION
CASE TITLE ARNOLD MAURICIO, JR. V. JACK R. DUCKWORTH	DOCKET NUMBER S85-00523 NAME OF JUDGE ALLEN SHARP

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that petitioner take nothing, the writ is denied and the petition is dismissed.

CLERK RICHARD E. TIMMONS	DATE May 2, 1986
(BY) DEPUTY CLERK Karen L. Bridges	

A-20

EDITOR'S NOTE

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No. 87-2080

Supreme Court U.S.
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JACK R. DUCKWORTH and
INDIANA ATTORNEY GENERAL

Petitioners,

vs.

ARNOLD MAURICIO, JR.,

Respondent.

On Petition For a Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in ruling that the State's knowing failure to disclose during discovery the identity of an alibi rebuttal witness it intended to call to testify violated due process, under this Court's decision in Wardius v. Oregon, 412 U.S. 470 (1973).

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OPINIONS BELOW

The decision of the United States Court of Appeals is reported at Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1988). The decision of the United States District Court for the Northern District of Indiana is reported at Mauricio v. Duckworth, 633 F. Supp. 1302 (N.D. Ind. 1986).

JURISDICTION

The jurisdiction of the Court is invoked properly under 28 U.S.C. § 1254 (1). The petition was timely filed on June 20, 1988, within 90 days from the denial of Petitioner's petition for rehearing by the United States Court of Appeals for the Seventh Circuit. Although the petition was filed in this Court June 20, it was not received by respondent until July 11, 1988. This brief in opposition is timely filed, within the 30 days from receipt of the petition as allowed by Rule 22, Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

Respondent Arnold Mauricio, Jr., was convicted of aiding felony murder and robbery, in the circuit court of Allen County,

Indiana. He was sentenced to a term of 30 years in prison. His conviction was affirmed by the Indiana Supreme Court in Mauricio v. State, 476 N.E.2d 88 (Ind. 1985). On direct appeal, he claimed, inter alia, that his right to due process was denied by the admission into evidence of testimony by the State's alibi rebuttal witness Sharon McDonald, whose identity intentionally was not disclosed to the defense during the discovery process.

Subsequently petitioner filed an application for a writ of habeas corpus in the United States District Court for the Northern District of Indiana, raising the same due process claim advanced in the Indiana Supreme Court. The district court concluded that the State's failure to divulge its rebuttal witness violated Mauricio's right to due process, but denied the petition for habeas corpus upon concluding that the error was harmless. Mauricio v. Duckworth, 633 F. Supp. 1302 (N.D. Ind. 1986). The Court of Appeals for the Seventh Circuit reversed and granted the petition for writ of habeas corpus, concluding that Mauricio was denied due process of law and that the error was not harmless.

Pursuant to Indiana statutes and the State's motion, the trial court ordered the defendant to disclose his intention to offer an alibi and ordered him to disclose the names of all persons whom he might call at the trial as witnesses. The State was ordered to divulge its witnesses. Defendant listed six persons including Janice and William Tuttle, and Lisa Michaels, who testified regarding an alibi for Mauricio. The State listed 59 witnesses. Its list intentionally omitted the name of Sharon McDonald. At the time of complying with the court's discovery order, the State knew that McDonald would testify that she had been present at a meeting at which Michaels and Janice Tuttle agreed to testify falsely in support of Mauricio's alibi. McDonald had discussed her willingness to testify as stated above one month before the State tendered its witness list and five months before trial. The State was able under Indiana's discovery rules to depose defendant's witness and thus to know

their testimony. Defendant could not depose McDonald before trial and thus was surprised by her testimony.

At trial, Mauricio chose to present the alibi testimony. The State then called McDonald in rebuttal. The defense moved for a mistrial or to exclude her testimony but the motions were denied.

The district court and the circuit court of appeals each found that due process was violated by the non-reciprocal nature of the discovery in this case and the interference with Mauricio's ability to determine the nature of his defense. The evidence against Mauricio was circumstantial and tenuous. The surprise testimony of McDonald constituted a devastating blow to the defense and may well have led the jury to convict him. According to the Court of Appeals, "It is difficult to conceive of a more devastating revelation to a jury than that which occurred here.... [A]bsent McDonald's tainted rebuttal testimony, the State's case cannot fairly be described as 'overwhelming'...." 840 F.2d at 460.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

I. PETITIONER HAS NOT DEMONSTRATED SUFFICIENT JUSTIFICATION FOR THIS COURT TO GRANT A WRIT OF CERTIORARI.

The decision of the Seventh Circuit in this case does not represent a significant departure from this Court's decision in Wardius v. Oregon, 412 U.S. 470 (1973). That decision recognized that discovery is not required as an element of due process but that "discovery must be a two-way street." Id. at 475. This Court recognized that:

> It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state. (footness omitted).

Id. at 475-76. Wardius ruled that due process would not be

satisfied by the State disclosing only the time and place of the offense when the defendant discloses the identity and addresses of alibi witnesses. Id. at 478 n.12. The inadequate level of disclosure condemned by Wardius is precisely the level of disclosure which occurred in the instant case.

When the respondent, in complying with discovery orders, disclosed to the prosecution its potential witnesses including alibi witnesses, the prosecution had a continuing duty to notify him of the identity of all witnesses it might call, including alibi rebuttal witnesses. The identities of witnesses called to discredit the defendant's alibi witnesses are discoverable in order to prevent unfair surprise at trial. Had the respondent received the name of Sharon McDonald as a potential State witness, he would have deposed her as allowed under Indiana's liberal discovery rules. Then, he could have either attempted to find evidence to impeach her testimony or decided not to present his alibi witnesses. Reciprocal discovery of alibi witnesses "entitles a defendant to evaluate the strategy of advancing an alibi defense in light of the named rebuttal witnesses." United States v. Myers, 550 F.2d 1036, 1043 (5th Cir. 1977).

The decision of the Court of Appeals for the Seventh Circuit is not in conflict with any decision of another court of appeals or of this Court. The State has not otherwise shown that there exist "special and important reasons" for the review of the Seventh Circuit decision as required by Rule 17, Rules of the Supreme Court of the United States.

The State's suggestion, Petition at 7, that the instant decision is in conflict with United States v. Ortega-Chavez, 682 F.2d 1086 (5th Cir. 1982), and United States v. Bouye, 688 F.2d 471 (7th Cir. 1982), is erroneous. Those courts found no due process violation in the government's failure to disclose alibi rebuttal witnesses and in their subsequent testimony at trial. Crucial to both decisions was that the government did not demand from the defendant a notice of the intent to rely on an alibi defense. Ortega-Chavez at 1089, Bouye at 473. In the instant

case, however, the State filed a discovery request which sought disclosure of any defenses which would be asserted. In response, the respondent filed a list of the six witnesses he intended to call at trial and notified the State of his intention to rely on an alibi defense. Thus, the State's demand of notice of the petitioner's intent to rely on an alibi defense and its obtaining the short list of witnesses triggered a reciprocal obligation on the State to supply "'any other witnesses to be relied on to rebut [the] testimony of any of the defendant's alibi witnesses.'" Ortega-Chavez at 1089.

II. THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO REVIEW THE SEVENTH CIRCUIT'S HARMLESS ERROR ANALYSIS.

The Seventh Circuit in this case followed this Court's precedents in Chapman v. California, 386 U.S. 18 (1967), and United States v. Hasting, 461 U.S. 499 (1983), in determining that the State of Indiana's failure to afford reciprocal discovery to respondent was not harmless error. The court of appeals recognized that no witness positively identified respondent and that the testimony of the police officer who placed Mauricio near the scene of the crime was questionable. Accordingly, it correctly concluded that the evidence was not overwhelming and thus that the constitutional violation was not harmless:

> Any recapitulation of the evidence adduced at Mauricio's trial must begin with an acknowledgment that, as the Indiana Supreme Court stated, evidence of Mauricio's identification was "circumstantial." 476 N.E.2d at 91. In fact, neither of the witnesses to the crimes for which Arnold Mauricio was convicted could positively identify him as having been at the crime scene. Whoever accompanied Mark Mauricio on the night of February 3, 1982 was wearing a ski mask. If this fact alone were not sufficient to demonstrate that the State's evidence falls short of being "overwhelming", also questionable is the eyewitness identification of Mauricio by Officer Lalone, who identified Arnold Mauricio as the individual he stopped from riding his snowmobile in the street. On cross-examination, however, Lalone admitted to having mistakenly identified Mauricio to his partner, at a time when Mauricio had been incarcerated, as a man emerging from the county office building.

840 F.2d 454, 459-60 (7th Cir. 1988)

Petitioner asserts that the court of appeals decision in

this case is contrary to that court's decision in another case, Alicea v. Gagnon, 675 F.2d 913 (7th Cir. 1982). That assertion was made in the State's petition for rehearing to the Seventh Circuit. The panel denied the petition and the entire court denied the suggestion for rehearing en banc. Alicea is distinguishable on its facts from the instant case. This Court does not normally grant a writ of certiorari to consider alleged conflicts of decisions in a single court of appeals, nor would it be appropriate for the Court to reweigh the facts of the two cases. The court of appeals carefully evaluated the facts presented in the record of respondent's trial; its determination that the evidence was not overwhelming should not be reviewed by this Court.

CONCLUSION

The Seventh Circuit decision in this case correctly applied existing precedent. Petitioner has not demonstrated any reason appropriate for this Court to consider reviewing the appellate court's decision. Accordingly, respondent requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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